IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 514 OF 2006
IN
NOTICE OF MOTION NO. 163 OF 2005
IN
NOTICE NO.N/176 OF 2005

Samir Dineshchandra Sarvaiya residing at Ameelya, 4th floor, Walkeshwar Road, Teenbatti, Mumbai - 400 006.	.. Appellant (Original Judg. Debtors)
Versus	
SICOM Limited, a Company incorporated and registered under the Companies Act, 1956, and having its registered office at 'Nirmal', 1st floor, Nariman Point, Mumbai-400 021.	.. Respondent (Original Judg. Creditors)

Mr. Shekhar Naphade, senior counsel with Mr. M.K. Nesari i/b Mr. M.K. Nesari for the appellant.

Mr. P.V. Shah for the respondent.

CORAM: R.M. LODHA &
S.A. BOBDE, JJ.

DATED: 19TH AUGUST, 2006

ORAL ORDER : [Per R.M. Lodha, J.]

. The appellant stood guarantee to one M/s. Serene Industries Limited (for short 'the said company') in respect of the loan taken by the said company from SICOM Limited. The said company has been registered with B.I.F.R. being sick company on 10th July, 2002.

On 16th April, 2003, the B.I.F.R. granted permission to the respondent to proceed with the suit for recovery of its dues, but imposed condition that decree, if any, shall not be executed without specific prior permission of the Board.

2. That the respondent got the decree against the present appellant on 22nd September, 2003 is not in dispute. As the present appellant did not satisfy the decree, the respondent took out insolvency notice against the appellant on 15th September, 2005. The appellant took out Notice of Motion No. 163 of 2005 alongwith other guarantor for setting aside the insolvency notice on 24th October, 2005. The present respondent opposed the Notice of Motion by filing reply Affidavit on 3rd January, 2006. The appellant thereafter filed rejoinder on 16th January, 2006.

3. The learned Insolvency Judge heard the Notice of Motion and by the order dated 18th April, 2006 dismissed the Notice of Motion taken out by the appellant, giving rise to the present Appeal.

4. Mr. Shekhar Naphade, the senior counsel for the appellant strenuously urged that by virtue of the order dated 16th April, 2003 passed by the B.I.F.R.,

prior permission of the B.I.F.R. for taking out insolvency notice was necessary.

5. The submission has no substance. The order passed by the B.I.F.R. on 16th April, 2003 reads thus:

> "As the dues of the public FIs/Banks were held up and as the promoters were delaying the SIA ordered by the Bench, IFCI, SICOM, OBC, BOI and DB were permitted to file/pursue their recovery proceedings on condition that decrees, if any granted, shall not be executed without specific prior permission of the Board."

6. In our considered view, the permission contemplated in the order dated 16th April, 2003 is in respect of the decree that may be obtained by the respondent against the said company. It is not, nor it could have been, in contemplation of the order dated 16th April, 2003, to obtain prior permission for execution of the decree dated 22nd September, 2003 against the guarantor/s. The order dated 16th April, 2003 cannot be construed to extend protection to the present appellant as guarantor in opposing the execution of the decree dated 22nd September, 2003.

7. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short ‘SICA, 1985’)

reads thus:

> "22. **Suspension of legal proceedings, contracts, etc. -** (1) Where in respect of an industrial company, an inquiry under section 16 is pending or any scheme referred to under section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under section 25 relating to an industrial company is pending, then, notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the memorandum and articles of association of the law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof [and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company] shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority."

8. The senior counsel for the appellant would submit that the execution of the decree is nothing but a further proceeding in the suit and, therefore, Section 22 is an embargo for the creditor-decree holder in executing the decree against the guarantor as well. We do not think so. The execution of the decree is a proceeding other than the suit as is commonly understood in law. Surely the execution of the decree is not

covered by the expression "suit" under Section 22 of the SICA, 1985.

9. Moreover, in **Sharad R. Khanna Vs. Karimjee Limited, 1994(3) Bom.C.R., 223** the Division Bench of this Court held that the issuance of insolvency notice is an independent proceeding with its own consequences. This Court further held that it is difficult to consider the issuance of an insolvency notice as proceeding further with the original suit. This is what the Division Bench had to say:

> "8. It is next submitted that section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 has been amended by Amending Act of 1993 as a result of which certain protection is given to a guarantor. In the present case the decree against the appellant is in his capacity as a guarantor of certain debts incurred by a company which is at present before the Board of Industrial Finance and Reconstruction. The application of the company has been rejected by the Board but an appeal under section 25 is still pending. Under amended section 22, *inter alia*, no suit for the enforcement of any guarantee in respect of any loans or advance granted to the industrial company "shall lie or be proceeded with further" except with the consent of the Board or, as the case may be, the Appellate Authority. this amendment came into effect from 1st February 1994. The question is whether issuance of an insolvency notice and its service can be considered as the original suit for the enforcement of guarantee being further proceeded with. it is difficult to consider the issuance of an insolvency notice as proceeding further with the original suit. It is an independent

> proceeding with its own consequences although it may be considered as a mode of equitable execution. In any case this amendment came into force only with effect from 1st February 1994. It cannot affect retrospectively an insolvency notice issued and served long prior to coming into effect of the Amending Act. The Amending Act is prospective and will apply to all suits filed or proceeded with after the amendment came into effect. Section 22, therefore, as amended, cannot affect the order in the present case which is in a Notice of Motion to set aside the insolvency notice. This point was also not urged before the learned single Judge. However, since it is a point of law we have allowed the appellant to urge it."

10. The aforesaid legal position laid down in **Sharad R. Khanna** has been accepted and rather followed in subsequent decision in the case of **Dewal Singhal Vs. State of Maharashtra, 2001 [Vol.106] Com. Cases, 587**. Incidentally we may notice that at the time the case was decided by the Division Bench in **Dewal Singhal**, the judgment of the Supreme Court in the case of **M/s. Patheja Brothers Forgings & Stamping & Anr. Vs. I.C.I.C.I. Ltd. & ors., AIR 2000 S.C., 2553** had already come. The judgment of the Supreme Court in the case of **Patheja Brothers** was also considered by the Division Bench in **Dewal Singhal**. This is how the Division Bench dealt with the matter in **Dewal Singhal**:

> "The appellant is the guarantor of certain

loans to Singhal Swaroop Ispat Ltd. in respect of which, proceedings are pending before the BIFR under the provisions of the SICA. In view thereof, the recovery certificate itself could not be enforced against the appellant in his capacity as guarantor of certain loans to the said industrial company in respect of which, proceedings are pending before the BIFR under the SICA.

. Reliance is placed on the provisions of section 22 of the SICA as interpreted by the Supreme Court in the judgment of *Patheja Brothers Forgings and Stamping Ltd., vs. ICICI Ltd.* [2000] 102 Comp Cas 21; [2000] 8 JT SC 252. The Supreme Court after analysing the provisions of section 22, held in *Patheja Brothers Forgings and Stamping Ltd.'s* case [2000] 102 Comp Cas 21; [2000] 8 JT SC 252 that in the case of an industrial company in respect of which proceedings are pending in the BIFR no proceedings for winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company, or for the appointment of a receiver, could be instituted or proceeded with. A suit or any proceedings for the enforcement of security could not be maintained against such industrial company and a suit for enforcement of a guarantee in respect of any loan or advance granted to the industrial company was barred. A reading of the judgment of the Supreme Court makes out this distinction and the learned judge was, therefore, right in his view that, as far as the proceedings against the guarantor of the loan to the industrial company are concerned, the bar under section 22 is restricted only to a "suit" and does not apply to any other proceedings. The learned single judge also relied on the judgment of this court in *Sharad R. Khanna v. Karimjee Ltd.* [1995] 84 Comp Cas 611; [1994] 3 BCR 223. The Division Bench of this court, in this case, was squarely concerned with a situation of an insolvency notice issued to such a guarantor company. The Division Bench opined that it was difficult to consider the issuance of an insolvency notice as "proceeding further"

> with the original suit. It was held that an insolvency notice is an independent proceeding with its own consequences, although it may be considered as a mode of equitable execution.
>
> . As far as the appellant's case is concerned, in our judgment, the view taken by the Division Bench of this court in *Sharad R. Khanna v. Karimjee Ltd.* [1995] 84 Comp Cas 611' [1994] 3 BCR 223 was binding on the learned single judge. It is indeed binding on us too. Upon a conjoint reading of *Patheja Brothers Forgings and Stamping Ltd.'s* case [2000] 102 Comp Cas 21; [2000] 8 JT SC 242 and *Sharad R. Khanna v. Karimjee Ltd.* [1995] 84 Comp Cas 611' [1994] 3 BCR 223, we are of the view that the only proceeding against the guarantor of a loan to an industrial company which is barred under section 22 is a "suit" and nothing else. An insolvency notice is not a suit and, therefore, the said proceeding was not barred."

11. The exposition of law in the aforesaid two judgments viz. **Sharad R. Khanna** and **Dewal Singhal**, with which we respectfully agree, lead us to hold that the proceedings by way of insolvency notice are not covered by the expression "suit" and though it has a trapping of an equitable execution, the execution being levied against the guarantor, Section 22 creates no legal bar for proceeding with the insolvency notice.

12. In **Kailash Nath Agarwal & ors. Vs. Pradeshiya Industrial & Investment Corporation of U.P. & anr., AIR 2003 S.C., 1886**, the Apex Court held that a

suit is an action taken in Court of law; having regard to the judicial interpretation of the word ‘suit’, it is difficult to say that the word ‘suit’ in section 22(1) of the SICA, 1985 means anything other than some form of curial process. The Supreme Court first referred to the provisions of Section 22(1) prior to amendment in the year 1994 and then in paragraph 19 of the Report noticed the amendments brought in Section 22(1) by Amendment Act 12 of 1994 and then held in paragraph 20, 23, 24, 25, 26, 27, 28, 29 and 30 thus:

> "20. There is an apparent distinction between the expression ‘proceeding’ and ‘suit’ used in section 22(1). While it is true that two different words may be used in the same statute to convey the same meaning, that is the exception rather than the rule. The general rule is that when two different words are used by the same statute, prima facie one has to construe these different words as carrying different meanings. IN Kanhaiyalal Vishindas Gidwani (supra), this Court found that words ‘subscribed’ and ‘signed’ had been used in the Representation of People Act, 1951 interchangeably and, therefore, in that context the Court came to the conclusion that when the Legislature used the word ‘subscribed’ it did not intend anything more than ‘signing’. The words ‘suit’ and ‘proceeding’ have not been used interchangeably in SICA. Therefore, the reasons which persuaded this Court to give the same meaning to two different words in a statute cannot be applied here.
>
> 21. .....
> 22. .....
>
> 23. A definition of the word ‘suit’ has been given in Pandurang R. Mandlik vs. Shantibai R. Ghatge (supra) but in the

context of Section 11 of the Code of Civil Procedure. This is what the Court said.

> "In its comprehensive sense the word 'suit' is understood to apply to any proceeding in a Court of justice by which an individual pursues that remedy which the law affords. The modes of proceedings may be various but that if a right is litigated between the parties in a Court of justice the proceeding by which the decision of the Court is sought may be a suit."

24. According to these decisions, a suit is an action taken in a Court of law.

25. Having regard to the judicial interpretation of the word 'suit', it is difficult to accede to the submission of the appellants that the word 'suit' in Section 22(1) of the Act means anything other than some form of curial process.

26. Apart from the semantic difference between the words 'suit' and 'proceeding' there is the absence of expansive words 'or the like' which appear after the expression 'proceedings', after the word 'suit'. The exclusion of such omnibus expression' after the word 'suit' must be given some weight in interpreting the word. As held by this Court in LIC v. Escorts Ltd. (supra)

> "The distinction made by Parliament ..... in the several provisions of the same Act cannot be ignored or strained to be explained away by us. That is not the way to interpret statutes. The proper way is to give due weight to the use as well as the omission to use the qualifying words in different provisions of the Act. The significance of the use of the qualifying word in one provision and its non use in another provision may not be disregarded."

27. Since the Legislature has expressly

chosen to make a distinction between the suits for recovery of the money and enforcement of guarantees and proceedings for the recovery of money that must be given effect to.

28. Furthermore, the Parliament must be taken to be aware of the decision in Maharashtra Tubes and the fact that the word 'proceeding' used in section 22(1) had been widely construed to include proceedings for recovery of dues by State Financial Corporation as arrears of land revenue. The deliberate choice of the word 'suit' in the circumstances would indicate that Parliament intended to limit the ambit of the amendment introduced to particular modes for the recovery of money or enforcement of guarantees.

29. One of the reasons for the word 'proceeding' in Section 22(1) being construed widely by this Court in Maharashtra Tubes was that the proceedings were against the company itself. Having regard to the object of the Act viz. if possible to revive the company, as also the operation of the various sections towards this end, the Court held that it would be unreasonable to give such meaning to the word 'proceeding' as would result in dealing a death blow to the Company so that the entire procedure envisaged under the SICA would be set at naught.

30. We have been unable to find a corresponding reason for widening the scope of the word 'suit' so as to cover proceedings against the guarantor of an industrial company. The object for enacting the SICA and for introducing the 1994 amendment was to facilitate the rehabilitation of the winding up of sick industrial companies. It is not the stated object of the Act to protect any other person or body. If the creditor enforces the guarantee in respect of the loan granted to the industrial company, we do not see how the provisions of the Act would be rendered nugatory or in any way affected. All that could happen would be that the guarantor would step into the shoes of the creditor vis-a-vis the company to the extent

of the liability met."

13. The Supreme Court in paragraph 34 held that till 1994 no protection was awarded to the guarantors under the SICA, 1985 at all and a limited protection has been given in the year 1994. This is what the Supreme Court has to say finally in paragraph 35.

> "35. Finally, the phrase introduced by the 1994 amendment relates to the pre-decretal stage because recovery proceedings by way of execution is already covered under the first half of sub-section (1) of Section 22. If the procedure under U.P. Act is covered under the word 'proceeding' in the first limb of Section 22(1) of SICA, which it is according to Maharashtra Tubes, it is not a 'suit' for recovery under the second limb of that Section. As rightly contended by learned Counsel appearing for PICUP, the proceedings under the U.P. Act are really recovery proceedings within the meaning of the word 'proceeding' as defined in Maharashtra Tubes. Since Section 22(1) only prohibits recovery against the industrial company, there is no protection afforded to guarantors against recovery proceedings under the U.P. Act."

14. Pertinently by bringing amendment in Section 22(1) of SICA, 1985 by Amending Act 12 of 1994, the Legislature consciously used the expression "and no suit" for the recovery of money or for the enforcement of any security against the industrial company or of any

guarantee in respect of any loans or advance granted to the industrial company brought in the amendment, but excluded the expression "execution", "distress or the like" that provides for the protection in respect of the properties of the industrial company. In other words, save and except the proceedings by way of suit, no other proceedings have been protected by the amendment in Section 22(1) against the guarantor of an industrial company.

15. We are, thus, satisfied that the order passed by the learned Single Judge does not call for any interference.

. The Appeal is dismissed.

Sd/-
[R.M. LODHA, J.]

Sd/-
[S.A. BOBDE, J.]